UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PAVERS AND ROAD BUILDERS DISTRICT COUNCIL WELFARE FUND, ANNUITY FUND AND APPRENTICEHIP AND TRAINING FUND

and **Case No. 29-CA-29656**

LOCAL 175 UNITED PLANT & PRODUCTION WORKERS, INTERNATIONAL UNION OF JOURNEYMEN & ALLIED TRADES

Tara O'Rourke, Esq., Counsel for the General Counsel
Benjamin A. Karfunkel, Esq., Counsel for the Charging Party
Scott P. Trivella, Esq., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on December 16, 2009 and February 8, 2010. The charge was filed on June 15, 2009 and the Complaint was issued on September 30, 2009. In substance, the Complaint alleged as follows:

1. That on July 20, 2009, Local 175 was certified as the collective bargaining representative of the employees of the Respondent in the following unit:

> All full-time and regular part-time employees including clerical employees, administrative assistants and receptionists employed by the Respondent at its 136-25 37th Avenue, Flushing, New York facility, but excluding maintenance employees, confidential employees, guards and supervisors as defined in the Act.

2. That from March 2009 until September 2009, the Respondent refused to meet and bargain with Local 175.

3. That on January 1, 2009, the Respondent unilaterally and without affording Local 175 an opportunity to bargain, subcontracted out the following work, which had been done by bargaining unit employees:

(a) The printing and mailing of checks;
(b) The processing of out-of-network claims;
(c)The processing of prescription drug claims; and
(d) The processing of home delivery prescription drug claims.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

(a) Background

The Respondent is an entity that consists of various trust funds that provide, *inter alia*, health and pension services to about 1500 people who are represented by the Pavers and Road Builders Union. These are benefit funds established under Section 302 of the National Labor Relations Act and pursuant to collective bargaining agreements between this Union and various employers. The funds have three union and three company trustees. The day to day operations are managed by Joseph Montelle who is the fund manager.

For at least three years before 2007, the employees of the funds were represented by another union. [1] But in or about 2006, Local 175, United Plant & Production Workers, filed a petition to represent the employees who worked in the office and who handled claims of the Plans' participants. Pursuant to a Decision and Direction of Election, an election was conducted in the above described bargaining unit and Local 175 received a majority of the valid votes counted. After an investigation of Objections, Local 175 was ultimately certified as the collective bargaining representative on July 20, 2007. The bargaining unit consists of about nine full-time and about 2 regular part-time employees.

(b) The alleged failure to bargain

According to Eric Chaikin who was the chief negotiator for Local 175, there were no meetings held in 2007 despite his requests for bargaining. He states that he filed an unfair labor charge and as a result, the Respondent offered to meet in 2008. According to Chaikin, there were three meetings in 2008 and two meetings in 2009. In 2009, the meetings were held on March 3, 2009 and September 23, 2009. The principal spokes-people for the Respondent were Andrew Gorlick or Christopher Smith.

According to Chaikin, as of March 3, 2009, the parties were pretty far apart on their respective contract positions. He states that the Respondent was asking for substantial givebacks, including elimination of an annuity fund, changes in the welfare fund and the substitution of a 401(k) plan for the existing defined pension fund. Also, the employer was asking for the unlimited right to subcontract. Chaikin states that in response to the employer's position on subcontracting, he countered with a proposal that subcontracting would be fine so long as it did not affect the employment of the bargaining unit employees. As of March 3, 2009, the parties had exchanged a set of written proposals.

[1] The previous union was the Amalgamated Union, Local 450-A.

Chaikin testified that on at least three occasions starting at the end of the meeting on March 3, 2009 and thereafter, he asked Smith to give him dates for new meetings. These requests, according to Chaikin, were made in the context of another litigation in which he and Smith were both involved. Also on June 1, 2009, he responded to an e-mail from Smith in connection with that litigation and stated; "Also, please give me some dates for the continued negotiations for the Paver's Fund employees." He states that he never received any response.

The last meeting was held on September 3, 2009 and apparently came about after the Union filed this unfair labor practice charge on June 15, 2009. It appears that in August, 2009, Chaikin received a phone call from the Respondent when they were at the NLRB, inviting a meeting the following day which he could not attend because of a personal matter. They later arranged for a meeting to take place on September 23, 2009 where not much happened.

Thus, from the Certification date of July 20, 2007, the parties met on a total of five occasions and the meetings in 2009, were only generated after the Union filed unfair labor practices. Since September 23, 2009, the Respondent has not responded to the Union's request for bargaining.

The Respondent asserts that the reason that it has not been able to effectively bargain with the Charging Party is that the three management and the three union trustees are at odds regarding their bargaining posture. No details were offered about this alleged impasse within the Respondent and even if true, this would not constitute a viable reason for not bargaining. Section 8(d) of the Act requires both Unions and Employers, having a collective bargaining relationship, to meet and bargain at reasonable times and places and to bargain in good faith. *Embossing Printers* 268 NLRB 710, 721 (l984); *Interstate Paper Supply Co., Inc.*, 251 NLRB 1423, (l980); and *Imperial Tile Co*. 227 NLRB 1751, 1754 (l977). This also means that the Act requires that each party bargain with the intent of reaching an agreement. *NLRB v Insurance Agent's Union*, 361 U.S. 477 (1960); *NLRB v. Herman Sausage Co*., 275 F.2d 229, 232 (5th Cir.1960); *Abingdon Nursing Center*, 197 NLRB 781, 787 (1972). Whatever internal difficulties that may exist within a union or an employer, these must be overcome so that good faith bargaining can take place and a collective bargaining agreement is the likely outcome. In *Valley Imported Cars*, 203 NLRB 873, 878 (1973), the Board stated:

> The law requires an employer to apply himself to collective bargaining sessions with the same degree of diligence and promptness as he does in his other important business interests, and his reluctance or apparent disinterest in this area or his failure to appoint an agent to negotiate fundamental issues is evidence of lack of good faith in the bargaining process.

Accordingly, based the facts described above, I conclude that in this respect, the Respondent has failed to meet at reasonable times and has failed to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act

(c) The subcontracting issue

There is no dispute that on January 1, 2009, the Respondent subcontracted certain claims review and other work that had previously been done by the bargaining unit employees. The Union asserts and the evidence establishes that although there were rumors about the possibility of subcontracting, it received no notification about the decision to subcontract and no opportunity to bargain.

For many years the Funds have contracted with a consulting firm called Segal Administration and Technology Consulting, herein called the Segal Company. And in 2009, the Segal Company was charged with evaluating the administration of the Funds. As testified to by fund manager Montelle, he was having difficulty with the employees at hand, in efficiently and timely handling claims, particularly health insurance claims. Moreover, given the recent poor performance of invested assets, the Funds had fewer dollars to work with.

As a consequence, the Segal Company, in 2009, sent a team of people to interview the people at the Funds and to evaluate its systems for receiving claims and making payments. On or about May 28, 2009, the Segal Company delivered a confidential report to the Fund's trustees that made a number of findings and alternative suggestions. Among other things, the report stated:

> **Overall Findings**
> Overall, the Fund Office staff works hard and is dedicated to providing quality service to participants, contributing employers and the District Council and generally knowledgeable in the required functions of their positions. However, many processes are performed and tracked manually or with minimal automation and computer support. In addition, the current staff schedules and organizational structure are not conducive to a more productive cost effective operational environment. As a result, the Fund Office staff may be performing tasks that are repetitive, unnecessary or that could be more efficiently automated. Specific findings include:
> The Fund's administrative processes are inefficient and manually intensive;
> The Fund is not well trained on the use of computerized office applications and system capabilities and functionality;
> The Fund lacks direction and guidance for leveraging its current technology and automating its processes; and
> The prevalence of part-time and temporary employees creates workflow disruptions and decreased productivity.
>
> * * *
>
> **Conclusions**
> If the Trustees decide to invest the time, financial resources and staff development effort to implement the recommendations provided in this report, we believe that the Funds would achieve administrative efficiencies that could eventually result in cost savings as a result of gradual staff reductions and/or attrition. Efficiencies and reduced costs … may be achieved more immediately by outsourcing all administrative functions to both a carrier and third party administrator. However, as we indicate later in this report, there are trade-offs to take into account before such a drastic course of action is undertaken.

In the end, the report recommended three alternative solutions; one being an internal overhaul of the funds; second a full outsourcing solution; and third a hybrid solution, combing internal improvements with a degree of subcontracting. According to fund administrator, Montelle, he and the trustees decided to go with the hybrid solution and this entailed some degree of outsourcing some of the work that had previously been done by the Respondent's employees. It was in his opinion, very important to have the existing staff continue in their jobs, albeit with somewhat reduced work loads.

With respect to the subcontracting issue, I note that there was no immediate emergency that would have caused the Funds to suffer some sort of catastrophic impact.

That is, in the absence of change, the funds, given a continuation of their current situation, would probably have suffered a gradual decline in their ability to service their clientele.

I do not doubt that the Funds warranted a modernizing make-over. But is not my function to pass on whether the changes were good, bad or indifferent. The only question here is whether in the absence of some exigent circumstances not present here, the Respondent was required to bargain with the employees' collective bargaining representative before making the decision to subcontract out bargaining unit work. Secondly, there is a question as to whether the changes involved were substantial and material.

Hearing from employees that they feared a loss of jobs, Chaikin wrote to Smith on November 17, 2009. He stated;

> Rumors abound that the Fund Trustees intend to contract out to Magna Care the processing of certain claims resulting in the permanent layoff of two individuals on or about January 1, 2009….
>
> I thought I should write to you at this time to protest, in advance, any such lay off and sub-contracting out of claims processing….
>
> I would request that this letter be presented to the Board of Trustees for their review and discussion before they make any decision on the issue of contracting out of work. Further, since there has been no discussion or bargaining over the subject of contracting work out, I specifically demand that Fund bargain, not only over the effects of any such decision; but over the decision itself, as it is apparently founded upon false assumptions. If the rumors are true, and the Fund insists on contracting the work out without bargaining over the subject, Local 1754 intends on filing an Unfair Labor Practice charge with the NLRB.

According to Chaikin, he received an e-mail response to the effect that the Fund would not act illegally. No offer was made to bargain.

According to one of the witnesses, the employees did not really hear officially about the changes resulting from the subcontracting until the last week of December 2009 when plan participants were sent a letter explaining some of the changes. According to Chaikin, the Union did not receive any notice or offer to bargain before the changes were put into effect.

Subsequent to the subcontracting, the Respondent continued to provide the exact same services to its clientele. Hopefully, the changes resulted in greater efficiency in handling member claims at lower cost to the Funds. But there was, in my opinion, no change in the scope, nature and/or direction of the enterprise. [2]

Although no employees were laid off or had their normal hours of work reduced as a result of these actions, the evidence does show that employees in the bargaining unit probably lost some overtime opportunities. Thus, it cannot be said that the impact of the subcontracting

[2] I note, and the parties should keep in mind that the Respondent is not a commercial enterprise, whose purpose is to maximize profits. Rather, it is a non-profit enterprise, whose purpose is to maximize the services that it provides to the fund beneficiaries.

was not material. Moreover, unless constrained by the legal obligation to bargain, there would be nothing to restrain the Respondent from completely eliminating more or all of the bargaining unit work by further subcontracting to the outside contractor. This would, in my opinion, be a true slippery slope. If allowed to take an inch, there would be absolutely no constraint on taking the mile. [3]

In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that a decision to subcontract out maintenance work previously performed by bargaining unit employees constituted a mandatory subject of bargaining. In that case, the Employer had subcontracted out maintenance work for legitimate and non-discriminatory reasons. Thus, the Employer's rationale for the subcontracting decision was not relevant to the issue of whether it had an obligation to bargain about the decision.

Subsequent to the *Fibreboard* decision, the issue of subcontracting and bargaining was obliquely revisited by the Supreme Court in *First National Maintenance Corp. v. NLRB* 452 U.S. 666 (1981). In that case, which involved the employer's partial closing of its business, the Court held that certain types of managerial decisions could be made without bargaining, if the decision involved a change in the scope and direction of the enterprise, even if it had a direct affect on employment. The Court attempted to define a test which balanced an "employer's need for unencumbered decision making with the benefit of collective bargaining for labor management relations." At footnote 22, the Court noted, "we of course intimate no view as to other types of management decisions such as plant relocations, sales, other kinds of subcontracting, automation etc., which are to be considered on the particular facts." The Board in *Dubuque Packing Company*, 303 NLRB 386 (1991), set forth the criteria it would use to apply the Court's *First National Maintenance* decision. (*Dubuque* involved an employer's decision to relocate).

In *Torrington Industries,* 307 NLRB 809 (1992), the employer subcontracted work which resulted in the layoff of two bargaining unit employees who were replaced by independent contractors. The Board concluded that subcontracting decisions similar to those in *Fibreboard* were mandatory subjects of bargaining and did not require the burden shift test utilized in *Dubuque Packing Co.*, 303 NLRB 386 (1991), even if the decision was not motivated by labor costs. That is, the Board concluded that based on the Supreme Court's decision in *First National Maintenance*, supra, the Court had already struck the balance in favor of finding that decisions to subcontract required bargaining. Nevertheless, the Board did qualify its decision and stated;

> We agree that there may be cases in which the non-labor cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining. We do not reach that issue here, however, because the Respondent's reasons had nothing to do with a change in the "scope and direction" of its business. Those reasons thus were not matters of core entrepreneurial concern and outside the scope of bargaining.

Subsequent to its decision in *Torrington*, supra, the Board has continued to take the view that employers are required to bargain about a decision to subcontract irrespective of whether the decisions were motivated by labor cost factors.

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[3] Indeed, at a trustees meeting held on December 3, 2008, there was a discussion as to whether the employees should be given a guarantee that their jobs would not be eliminated. Such a guarantee was not passed at the meeting, (or thereafter), and it is clear from the minutes that at least some of the trustees indicated their desire to retain the right to lay off the employees in the future.

The Respondent makes what to me is a unique waiver argument. In substance, the Respondent asserts that before the Charging Party was certified, there was a predecessor union with which it maintained a collective bargaining agreement. It asserts that the previous agreement contained a management rights clause that gave management the right to "use independent contractors or subcontractors," and therefore in order to maintain the status quo during the current bargaining, the Charging Party should be bound by the previous contract's "waiver."

In my opinion, the Respondent's waiver argument has no merit. When there has been an election in which an incumbent labor organization has been superseded by another, any contract between the employer and the first union would become null and void by virtue of the explicit provisions of Section 8(d) of the Act. [4] Thus, any contract provision agreed to by the predecessor union that would purport to waive that union's right to bargain about certain subjects cannot be binding on a successor union that has won an election and therefore has the right to bargain on its own behalf and without any restrictions ceded by its predecessor.

In the present case, it is clear to me that the decision to subcontract out certain aspects of the bargaining unit's work was motivated, at least in part, by labor cost considerations. I also conclude that this decision did not result in any change in the scope, nature or direction of the Respondent's enterprise. And although the subcontracting decision did not result in the lay off of any unit employees, it did have, in my opinion, a material impact on the bargaining unit for the reasons stated above. *Overnite Transportation Company*, 330 NLRB 1275 (2000). Finally, the facts in this case do not show that the Respondent would have faced a crisis in its operations if it had bargained before it implemented its decision to subcontract.

Accordingly, it is my opinion that by failing to notify the Union and bargain with it about its decision to subcontract out bargaining unit work, the Respondent has violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. By unilaterally subcontracting bargaining unit work, the Respondent has violated Section 8(a)(1) and (5) of the Act.

2, By refusing to meet and bargain with the Union in a timely manner, the Respondent has violated Section 8(a)(1) and (5) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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[4] In pertinent part, Section 8(d) states:

> The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title],

Remedy

There is evidence in this record that the implementation of the subcontracting decision may have affected the ability of bargaining unit employees to earn overtime. The amounts in question are presently indeterminate and unless agreed to by the parties, can be resolved in a backpay proceeding.

Further, it is recommended that absent agreement between the Union and the Respondent, the Respondent rescind its contract with Magnacare. [5]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [6]

ORDER

The Respondent, Pavers and Road Builders District Council Welfare Fund, Annuity Fund and Apprenticeship and Training Fund, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Unilaterally subcontracting bargaining unit work to Magnacare, without first giving notice to and offering to bargain with Local 175, United Plant & Production Workers, International Union of Journeymen & Allied Trades.

(b) Refusing to meet and bargain with Local 175 at reasonable times and places with respect to the terms and conditions of employment of those employees represented by that labor organization.

(c) In any like or related manner, interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with Local 175, as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document.

(b) On request, bargain with the Union regarding the decision to subcontract out bargaining unit work.

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[5] The contract between the Respondent and Magnacare may provide better benefits to the Fund's beneficiaries than what had existed previously. Instead of simply rescinding this contract, the Union and the Respondent might consider alternatives that would be in the interest of the bargaining unit employees and the Fund's beneficiaries. One alternative would be for the parties to enter an agreement providing that for a defined period of time, the Respondent would not change or affect the employment status or hours of the existing Fund employees. My point is that a contract rescission remedy as applied to this kind of situation may be too blunt an instrument and that the parties might be better served if they could, by agreement, reach a viable alternative.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Rescind the contract with Magnacare.

(d) Make whole bargaining unit employees for any loss of pay or other benefits that they may have suffered as a result of its unlawful conduct in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e)Within 14 days after service by the Region, post at its facilities in New York, copies of the attached notice marked "Appendix " [7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 1, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 29, 2010.

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Raymond P. Green
Administrative Law Judge

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally subcontract bargaining unit work without first giving notice to and offering to bargain with Local 175, United Plant & Production Workers, International Union of Journeymen & Allied Trades.

WE WILL NOT refuse to meet and bargain with Local 175 at reasonable times and places with respect to the terms and conditions of employment of our employees.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, recognize and bargain collectively with Local 175, as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document.

WE WILL on request, bargain with the Union regarding our decision to subcontract out bargaining unit work.

WE WILL rescind our contract with Magnacare.

WE WILL make whole employees for any loss of pay or other benefits that they may have suffered as a result of our unlawful conduct.

Pavers and Road Builders District Council
Welfare Fund, Annuity Fund and Apprenticeship
and Training Fund
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.